

Question 2 – July 2013 – Selected Answer 1

1) The writing on the back of the electric bill constitutes a valid Holographic will. Under the Texas Probate Code, a holographic will is valid if: 1) the will is entirely in the testator's handwriting; 2) bears the testator's signature; and 3) is executed with testamentary intent (by a testator with sufficient capacity over the age of 18). Here, despite the printed words on the front of the receipt, the will is entirely in Rick's handwriting. The printed words may be disregarded as they do not apply to and are not necessary to understand the will. To be probated as a holographic will, there must be testimony by two witnesses familiar with the testator's handwriting that the instrument is entirely in his handwriting. Here, both Ginger and Suzy recognized the handwriting as Rick's and could testify to such. Under Texas Law, a mark intended by the testator to be his signature will suffice to prove execution of a will. Here, "/s/ R" is a sufficient marking to show Rick intended to sign the will. Lastly, a holographic will must be executed with testamentary intent. Under Texas law, testamentary intent must be evidenced by statements in the will showing that the testator intended it to take effect upon his death and to distribute his property in the final way indicated in the document. Here, Rick's heading the document "My Will" and specifically making distributions of his property to Evan and Suzy shows he intended the document to be his will and to take effect upon his death. Once a holographic will meets the formalities discussed above, it is valid and may be probated (with evidence by two witnesses as to testator's handwriting). The will does not need to be witnessed or signed by attesting witnesses when it meets the above stated requirements.

2) The estate should be distributed either all to Evan, Rick's son, or half to Evan and half to Ginger, if the court finds adoption by estoppel. Assuming the writing is a valid will, Suzy will not take anything, as they were divorced when he died. Under Texas law, divorce revokes will bequests to former spouses (and their children), and the will is simply read as though the former spouse and her child predeceased the testator. Suzy may attempt to argue that the language "if she survives me" makes the bequest to her valid, but her argument will not stand. Evan is not entitled to receive Whiteacre outright. Where a will gives a specific bequest of property to a beneficiary, that specific devise will fail (i.e. fail) if the property named is no longer in the estate when the testator dies. Here, Rick sold Blackacre in January 2013, so the specific bequest to Evan failed as it was no longer in the estate. Evan's argument that he is entitled to Whiteacre because the proceeds from BA's sale were used to purchase it is incorrect. Had Rick left Evan "my interest in" Blackacre, such an argument might be valid. However, here it was a specific devise and so it fails. The sale of BA was a lifetime act with independent significance, and Evan cannot get title to Whiteacre because of ademption. Evan's argument that he is entitled to Whiteacre because his mother expressed the wish that Rick leave BA to him is also invalid. Her words that "she hoped" Rick would make sure Evan would get BA one day were not binding, but merely "precatory" words expressing her wishes. She did not leave BA to Evan in trust by expressing clear intent that Rick hold BA for Evan's benefit. Rather, her precatory words could be ignored and Rick obtained title in fee simple and was entitled to do whatever he wanted with the property without regard to any supposed interest Evan had. However, Evan will receive an interest in Whiteacre under the residuary clause in Rick's will which gave the rest of the estate to Rick's "heirs" if Suzy did not survive him. Ginger will argue that she is entitled to take because of the doctrine of adoption by estoppel. Adoption by estoppel is available when a party makes an unfulfilled promise to adopt a child and the child and other parties rely on that promise. Here, Rick and Suzy agreed that Rick would formally adopt Ginger, but the formal adoption never took place (at the request of Suzy, not Rick, as she did not want to involve the birth father). Ginger may be able to assert adoption by estoppel if she can show she relied on his unperformed promise to adopt. Here, she continued to have a relationship with him and otherwise

maintained contact. These facts may be considered reliance. There is also a question of whether Ginger, even if she is adopted by estoppel, would be allowed to take or whether she was expressly not provided for in the will and thus would not be a pretermitted child. If the court finds Rick did adopt Ginger either because of adoption by estoppel (or presumed paternity because he married Ginger's mom and arguably voluntarily asserted paternity), Rick's estate, including Whiteacre will pass in equal shares to Ginger and Evan (as adopted children take in the same proportion as biological children). If the court does not so find, Evan will take all.

Question 2 – July 2013 – Selected Answer 2

The writing on the back of the electric bill constitutes a valid holographic will.

(1) At issue are the requirements for a holographic will in Texas. In Texas a holographic will is valid if it is wholly in the handwriting of the testator, expresses testamentary intent, and is signed by the testator. There is no requirement that a holographic will be attested nor is there a requirement that it be dated. Although all of the will must be entirely in the testator's handwriting, non- handwritten material is permitted if it is not required for the will and is mere surplusage. Handwriting may be verified by two persons who can testify to their knowledge of the testator's handwriting, and that the will is written entirely in that handwriting. Here all of the will is written entirely in Rick's handwriting. The statement "My will" is probably sufficient to establish that Rick intended for the document to constitute his will, especially because it then dealt with the disposition of all of his property. The will also appeared to be intended to take effect on Rick's death. Rick's signing "R" is also sufficient because in Texas a testator may sign anywhere on the document and any mark intended to be that of the testator and authenticate the document is sufficient. The fact that the will is written on the back of a electric bill is irrelevant because all of the terms needed to constitute a valid holographic will are in the testator's handwriting and any printed words on the electric bill are surplusage and may be ignored. It is not required that the testator write his holographic will on a blank piece of paper. Ginger and Suzy are competent to testify as to Rick's handwriting because in Texas two persons who are familiar with the testator's handwriting are sufficient to establish the validity of a holographic will. Although there might be some issue as to an interested witness taking under the will, such an interested witness never affects the validity of a will, only the validity of a disposition. Because the will was wholly in Rick's handwriting, was signed by Rick, and was evidenced by testamentary intent, the writing constituted a valid holographic will.

(2) Suzy and Evan will take in equal proportions under the will. At issue is whether Ginger was validly adopted by Rick and how the estate will be distributed. Ginger was probably a child due to adoption by estoppel. Under the probate code an adopted child is a child for all purposes. Although there was no formal adoption, there was likely adoption by estoppel. Adoption by estoppel occurs when there was an agreement to adopt by a step-parent, but for some reason the formal adoption never took place, the child believed that she had been adopted, and the parent treated the child as his own for all purposes holding the child out as his own. Divorce revokes all bequests to the former spouse and her heirs unless the heirs are also related to the other spouse. Under the probate code, specifically devised property is adeemed if it is not in the testator's estate at death. Those who take under a residuary clause of a will take in equal shares. Here Suzy and Rick agreed that Rick, Ginger's stepfather, would formally adopt Ginger and Ginger was aware of this fact. It was only after consulting with an attorney and Suzy's reluctance that the decision to not formally adopt took place. Additionally Rick treated her as his daughter for all purposes and Ginger genuinely believed that she was adopted by Rick. The fact that Ginger never took Rick's name is not dispositive, especially here where it appears that Rick held the child out as his own and only declined to go through with the formal adoption process because Suzy did not want to involve the true father who had been a one night stand. Because it appears that adoption by

estoppel would apply on the facts, Ginger will be treated as a child of Rick for the purposes of inheriting from his estate. Under the will Evan was given a specific bequest of Blackacre and Suzy was given the remainder if she were to survive Rick otherwise the remainder was to go to Rick's heirs. The gift to Suzy was revoked in 2012 when Rick and Suzy divorced, therefore all of Rick's residuary estate would pass to his heirs under the residuary clause of Rick's valid will. The bequest of Blackacre was a specific bequest of real property, but Blackacre was not in Rick's estate when he died because he had sold it to purchase Whiteacre. A specific bequest not in the testator's estate is adeemed and fails. Texas follows the identity rule and will not trace a specifically devised gift in an attempt to satisfy a testator's probable intent. Therefore the gift to Evan fails and Whiteacre will pass under the residuary of Rick's will. Because Ginger was a child of Rick due to adoption by estoppel, her status as an heir was not revoked when Suzy and Rick divorced because although she was a relative of Suzy, she was also a relative of Rick. Ginger is therefore entitled to inherit from Rick. Because Rick's will left his property to "my heirs" after the gift to Suzy was revoked and the gift to Evan was adeemed, and Ginger and Evan are the heirs of Rick as his children, they each take one half of Rick's estate.

Question 2 – July 2013 – Selected Answer 3

1. The writing on the back of the electric bill constitutes a valid holographic will. Under Texas Law, a holographic will is valid if it is wholly in the testator's handwriting and is signed by the testator.

Here, the writing on the back of the bill is wholly in Rick's handwriting. Even though it was written on the back of a bill, the words of the bill do not destroy the validity of the holographic will because of the Rule of Surplusage. If the handwriting can be read with complete sense independent of the typed words then the typed words have no effect and the handwriting can be read independently. For example a typed heading of stationary will not defeat a holographic will underneath it because the stationary words are not needed. Here, the words of the electric bill are not needed and they will not destroy the validity of the will. Signed by the testator can include any mark or symbol that identifies the testator. Here the "R" Rick signed with will be sufficient to be a signature of the testator. No dates are needed to make a holographic will valid

Under Texas law, to prove up a holographic will you need to have two people attest to the testator's handwriting. Because both Ginger and Suzy recognize that the handwriting is Rick's making the will valid. However Ginger may be unable to prove that the handwriting is Rick's because she is a beneficiary in the will, which would make her an interested witness. In this situation if another person cannot be found to testify to the testator's handwriting then one disinterested witness can testify that it is that handwriting of the testator. Also, it is a will because there is intent to make property pass upon death. Evidenced by writing "my will" and distributing property to Evan and Ginger. The writing is a valid holographic will because it is wholly in Rick's handwriting (typewritten provisions not needed), Rick signed the will by writing "R", Rick showed intent to make property pass upon death, and there is at least 1 witness who can testify that it is Rick's handwriting.

2. Suzy will take nothing under the will. Evan and Ginger will split the estate equally (Evan does not get a superior interest in Whiteacre, it will be split evenly) Under Texas Law, If a will is executed before divorce, upon divorce any bequest made to the now ex-spouse and any descendants of the ex-spouse alone (and not related to the testator) are void. Gifts to ex-spouses pass as though the ex-spouse predeceased testator.

Suzy does not take anything under the will. Rick and Suzy Divorced in 2012. The will was executed in 2010. Because Rick and Suzy divorced after execution of the will Suzy's gift in the will is void. Under

Texas Law, a specific bequest of property applies only to interest of that property and will not include and proceeds of the sale of that property. Evan was left Blackacre in Bosque County. Rick sold Blackacre for Whiteacre after execution of the will. Evan is not entitled to Whiteacre because the will is a specific bequest that leaves Evan Blackacre. There is no right to proceeds of the sale of Blackacre in the will, only the right to Blackacre itself which is no longer available. Ademption applies because the specific item itself is no longer available. Alice's hope that Evan would get Blackacre is not binding upon Rick to leave it to Evan. Rick as the owner of Blackacre had a right to sell Blackacre. Only the testator's intent is taken into consideration when reading a will. Absent the specific intent of the testator to leave the proceeds of a sale to the beneficiary, the beneficiary will take nothing. Evan does not take Whiteacre because it is the proceeds of sale of Blackacre, he is only entitled to take Blackacre and because that no longer exist, Evan will take nothing.

Under Texas Law, Adoption by Estoppel applies when the parents intended to adopt a child and there was a promise to adopt but the adoption was never formally made official. Rick told Ginger that he was going to adopt her meaning there was a promise to adopt. There was even a joke at their ceremony that Ginger agreed to take Rick as her Father. Ginger remained under the impression that Rick had adopted her whole life. Rick and Suzy went to a lawyer to make the adoption official. Upon discovering that Ginger's real dad would be involved Suzy became reluctant to go through with the adoption. Here, all the conditions of adoption by estoppel are met. There was a promise by Rick to adopt Ginger and it was never formally gone through with because of Suzy's reluctance. Suzy's reluctance will not stop Rick from being treated as adopting Ginger by estoppel. Rick could have still gone through with the adoption; he just never got around to doing so. Rick treated Ginger as his own child and Ginger believed she had been adopted. Ginger even called Rick Dad. Under Texas Law, Adopted children are treated the same as natural children of the Testator. Adopted children will become the Testator's Heirs. Ginger will be treated as equally as Evan.

Because Suzy is treated as predeceased under the will, the will next states to my heirs. Ginger and Evan are both Rick's heirs and they will share the estate in equal amounts. Suzy gets nothing under the will because her and Rick are divorced making her gift void. Evan does not get White acre as proceeds of the Sale of Black acre, it is a specific request and ademption applies. Ginger will be treated as a natural child because adoption by estoppel applies. Evan and Ginger split Rick's Estate equally.